85-1256

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 85-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARIAN FLEMING COMSTOCK,
Appellant,

v.

HARRIS COUNTY, TEXAS,
Appellee.

On Appeal From The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas At Houston

JURISDICTIONAL STATEMENT

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January 20, 1986.

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QUESTION PRESENTED BY APPEAL

Whether the Texas condemnation procedure used by Appellee to condemn Appellant's property violated the Due Process Clauses of the Fifth and Fourteenth Amendments and the Just Compensation Clause of the Fifth Amendment to the federal Constitution by failing to require that Appellee give Appellant and her attorney appropriate notice of the filing of a special commissioners' condemnation award in order to sufficiently secure Appellant's opportunity under Texas law to seek judicial review of the condemnation award.

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HARRIS COUNTY, TEXAS,
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On Appeal From The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas At Houston

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Texas Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston (hereafter "the Houston Court of Appeals"), and the orders of the Supreme Court of Texas refusing Appellant's Application for Writ of Error to the Houston Court of Appeals and denying Appellant's Motion for Rehearing of her Application, which are included in the Appendix, are all unreported.

JURISDICTION

The Houston Court of Appeals' judgment was rendered on February 7, 1985. Appellant timely filed a Motion for Rehearing, that was overruled by the Houston Court of Appeals on March 14, 1985. On April 15, 1985, Appellant timely filed her Application for Writ of Error to the Houston Court of Appeals. On September 18, 1985, the Supreme Court of Texas refused Appellant's Application, and on October 23, 1985, denied Appellant's Motion for Rehearing of her Application. On December 23, 1985, Appellant filed a notice of appeal to this Court in the Houston Court of Appeals. This appeal is being docketed in this Court within 90 days from the denial of rehearing by the Supreme Court of Texas. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN CASE

Fifth Amendment, United States Constitution:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment, United States Constitution:

Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Tex. R. Civ. Stat. Ann. art. 3264, Repealed By Acts 1983, 68th Leg., p. 3729, eff. Jan. 1, 1984 (Vernon 1968):

1. When real estate is desired for public use . . . by a county . . . the party desiring to condemn

the property after having failed to agree with the owner of the land on the amount of damages shall file a statement in writing with the county judge of the county in which the land or a part thereof is situated . . .

2. When such statement is filed with the county judge, he shall . . . appoint three disinterested freeholders of said county as special commissioners to assess said damages . . .

* * *

5. Notice in writing shall be issued by the commissioners to each of the parties interested, notifying them of the time and place selected for the hearing.

* * *

10. When service of notice has been perfected, the commissioners shall at the time and place appointed or at any other time and place to which the hearing may be adjourned, proceed to hear the parties.

Tex. Rev. Civ. Stat. Ann. art. 3265, Repealed By Acts 1983, 68th Leg., p. 3729, ch. 576, § 6, eff. Jan. 1, 1984 (Vernon 1968):

* * *

5. When the commissioners have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due the owner, if any be found to be due, and shall date and sign such decision and file it together with all other papers connected with the case promptly with the county judge.

Tex. Rev. Civ. Stat. Ann. art. 3266, Repealed By Act 1983, 68th Leg., p. 3729, ch. 576, § 6, eff. Jan. 1, 1984 (Vernon 1968):

* * *

6. If either party be dissatisfied with the decision, such party may, on or before the first Monday following the 20th day after the same has been filed with the county judge, file his objection thereto in writing, setting forth the grounds of his objection, and thereupon the adverse party shall be cited and the cause shall be tried and determined as in other civil causes in the county court . . .

7. If no objections to the decision are filed within the time prescribed by Subdivision 6 of this Article, the County Judge shall cause said decision to be recorded in the minutes of the County Court, and shall make the same the judgment of the court and issue the necessary process to enforce the same.

Tex. Prop. Code Ann. § 21.049. (Vernon 1984):

The judge of a court hearing a proceeding under this chapter shall inform the clerk of the court as to a decision by the special commissioners on the day the decision is filed or on the next working day after the day the decision is filed. Not later than the next working day after the day the decision is filed, the clerk shall send notice of the decision by certified or registered United States mail, return receipt requested, to the parties in the proceeding, or to their attorneys of record, at their addresses of record.

STATEMENT OF THE CASE

On January 25, 1982, Appellee filed a petition in the County Court at Law No. 4 of Harris County, Texas (hereafter "the County Court"), to condemn approximately 8 acres of Appellant's land for use as a public road. Pursuant to the Texas condemnation statutes then in effect, Tex. Rev. Civ. Stat. Ann. arts. 3264, 3265, 3266 (Repealed) (Vernon 1968), the County Court appointed three special commissioners to assess damages. On July 20, 1982, the special commissioners held an evidentiary hearing attended by Appellant and her attorney.

At the conclusion of the hearing, the special commissioners made no award, and Appellee's attorney represented to Appellant's attorney that he would inform Appellant's attorney when the special commissioners made their award and filed it with the County Court. Under Subdivision 6 of Article 3266, Appellant was required to file her objections to the award on or before the first Monday following the 20th day after it was filed with the County Court. Under Subdivision 7 of Article 3266, the timely filing of objections was necessary in order to invoke judicial review of a special commissioners' award. No statutory provision, however, required Appellee to serve Appellant and her attorney with notice of the filing of the special commissioners' award. Furthermore, there was no mandatory time period within which the special commissioners were required to make and file an award.

On July 24, 1982, the special commissioners made their award, assessing $208,531.00 in damages against Appellee. The County Court signed the award and filed it with the Clerk of the County Court on July 26, 1982. Neither Appellant nor her attorney received notice

of these events until September 2, 1982, which was 17 days after the last day for timely filing objections to the award. On September 23, 1982, the County Court, finding that no timely objections to the award had been made, performed the ministerial duty of rendering judgment on the award.

On September 17, 1982, however, Appellant filed a petition for a bill of review in the County Court alleging that she had received no notice of the award until September 2, 1982, and that she had a meritorious defense to the award which she had been prevented from making by Appellee's failure to give her notice of its filing. On October 18, 1983, the County Court granted Appellant's bill of review, finding that Appellee's attorney had represented to Appellant's attorney that Appellant's attorney would be notified of the filing of the special commissioners' award and that the award was filed without any notice being given to Appellant or her attorney until September 2, 1982. The County Court concluded that Appellant's failure to receive notice of the award before September 2, 1982, was not in any way colored by negligence or fault on her part. Appellant's claim for just compensation was then tried before a jury, which awarded Appellant approximately $130,000.00 more in damages than the special commissioners had awarded her. (*See* Appendix *B*).

Appellee's appeal to the Houston Court of Appeals, however, was sustained on Appellee's first point of error that the County Court, as a matter of law, had erred in granting the bill of review because, under Articles 3264, 3265, and 3266, Appellant was not entitled to any notice of the filing of the special commissioners' award

and therefore had the duty to keep herself advised of the progress of the proceedings (See Appendix A).[1] The Houston Court of Appeals therefore set aside the jury's verdict and reinstated the special commissioners' award. (See Appendix C).

Appellant then timely filed a Motion for Rehearing containing the following ground for rehearing:

GROUND NUMBER SEVEN

THE COURT'S HOLDING RESULTS IN A DEPRIVATION OF APPELLEE'S PROPERTY WITHOUT DUE PROCESS OF LAW AND A TAKING OF APPELLEE'S PROPERTY WITHOUT JUST COMPENSATION.

Under this ground for rehearing, Appellant contended that her property had been taken from her in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments and the Just Compensation Clause of the Fifth Amendment to the federal Constitution. Appellant argued that Appellee's failure to give her notice had

1. The Houston Court of Appeals also held that Appellant failed to establish the existence of fraud to the degree necessary to warrant a bill of review under Texas law. However, the Houston Court of Appeals did not sustain any of Appellee's ten points of error asserting no evidence or insufficient evidence to support the County Court's ultimate findings of fact and conclusions of law entitling Appellant to her bill of review, particularly the finding that Appellee failed to give notice of the condemnation award to Appellant and her attorney until after the period for timely filing objections had expired. Hence, the Houston Court of Appeals' conclusion regarding the absence of fraud is not an adequate state law ground precluding this Court's review of the federal question presented, since Appellant's and her attorney's misplaced reliance on the attorney for Appellee's representation that notice would be given them would not have occurred if a statutory provision requiring Appellee to give notice of the filing of the award had existed.

deprived her of a reasonable opportunity to file objections contesting the special commissioners' award. (Appellee's Motion for Rehearing, pp. 13-14). On March 14, 1985, the Houston Court of Appeals overruled Appellant's Motion for Rehearing without commenting on the federal due process and just compensation questions. (See Appendix D).

Appellant then filed an Application for Writ of Error in the Supreme Court of Texas containing the following point:

SEVENTH POINT OF ERROR

THE COURT OF APPEALS' HOLDING RESULTS IN A DEPRIVATION OF PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW AND A TAKING OF PETITIONER'S PROPERTY WITHOUT JUST COMPENSATION.

Under this point, Appellant argued that, in view of the prevailing constitutional due process standards, the Texas condemnation procedure, which failed to provide a landowner with notice of the filing of a special commissioners' award, was patently unconstitutional and that the Houston Court of Appeals' denial of equitable relief had resulted in the deprivation of Appellant's property without just compensation and without due process of law in violation of the Fifth and Fourteenth Amendments to the federal Constitution. (Application for Writ of Error, pp. 25-27; Petitioner's Response to Respondent's Contest to the Application for Writ of Error, pp. 6-11).

On September 18, 1985, the Supreme Court of Texas refused Appellant's Application for Writ of Error with the notation "no reversible error", and on October 23,

1985, overruled Appellant's Motion for Rehearing without commenting on the federal due process and just compensation questions. (*See* Appendix E). On December 23, 1985, Appellant filed her notice of appeal to this Court. (See Appendix F).

THE QUESTION IS SUBSTANTIAL

The substantial question raised is whether the Texas condemnation procedure applied in this case violated the Due Process and Just Compensation Clauses by failing to provide Appellant with notice of the filing of the special commissioners' award so that she could timely exercise her statutory right to judicial review and a jury trial on damages.[2] This important question has not been decided by this Court.

In *Bragg v. Weaver,* 251 U.S. 57 (1919), this Court indicated that if a condemnation procedure failed to provide a means of notifying a landowner of the entry of a special commissioners' award, then the Due Process Clause might be violated. The Court was able to avoid the question because the statutory scheme in *Bragg* provided that if the landowner were *not* present when the award was made, then he would be given notice in writing and have 30 days to obtain judicial review. 251 U.S. at 61-62. Likewise, in *North Laramie Land Company v. Hoffman,* 268 U.S. 276 (1925), a landowner asserted that a statutory procedure for opening roads afforded

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2. In *Long Island Water Supply Company v. Brooklyn,* 166 U.S. 685 (1897), this Court held that the Due Process Clause does not require a jury trial on damages and that damages may be assessed instead by commissioners, "*at least where there is provision for a review of their proceedings in the courts.*" (Emphasis added). 166 U.S. at 694-695.

him no means of ascertaining when the county commissioners' decision to open a road across his property was made, thus commencing the time for obtaining judicial review. As in *Bragg*, however, this Court found in *North Laramie* that the statutes in question provided notice to affected landowners by requiring local publication of the county commissioners' decision.

Unlike the procedures in *Bragg* and *North Laramie*, the condemnation procedure used to condemn Appellant's property failed to provide *any* means of notifying her of the filing of the special commissioners' award. Notice of the filing of the condemnation award was necessary because under the procedure applied here, the special commissioners' award is not accorded finality until the landowner has decided whether to invoke his right to judicial review by filing his objections within 20 days after the award is filed with the County Court. Hence, the proceedings to determine just compensation continue if the landowner exercises his right to judicial review. Consequently, the provision for judicial review clearly presupposes that the landowner must have knowledge of the filing of the special commissioners' award. A landowner's opportunity to continue the proceedings by seeking judicial review is thus rendered meaningless without prior notice of the filing of the award.

Appellant submits that some form of notice was required since neither she nor her attorney were present when the award was made; for a fundamental requirement of due process in any proceeding which is to be accorded *finality* is notice, reasonably calculated under all the circumstances, to apprise the affected party of the pendency of the action and of the opportunity to present objecjections. *Mullane v. Central Hanover Bank & Trust Co.*, 339

U.S. 306, 314 (1950); *Walker v. Hutchinson City*, 352 U.S. 112, 115 (1956). Under these circumstances, the condemnation procedure used to condemn Appellant's property is constitutionally defective. It failed to adequately protect Appellant against an erroneous, arbitrary, and confiscatory condemnation of her property by securing her opportunity to seek judicial review.[3] Indeed, as the jury verdict demonstrates, this case furnishes powerful evidence of how the condemnation procedure applied here could result in an unjust, confiscatory taking by causing a landowner to lose the opportunity to invoke the protection of the courts. *See Dickey v. City of Houston*, 494 S.W.2d 648, 650 (Tex. Civ. App.—Houston [14th Dist.] 1973), *writ ref'd n.r.e.*, 501 S.W.2d 293 (Tex. 1973).

Appellant also submits that, in view of the interests at stake, the circumstances here gave Appellee no excuse for failing to give her notice of the filing of the award. Appellee knew the addresses of both her and her attorney. *Cf. Walker v. Hutchinson City*, 352 U.S. at 116; *Schroeder v. City of New York*, 371 U.S. 208, 210 (1962). That the private interests at stake were

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3. In *Matthews v. Eldridge*, 424 U.S. 319 (1976), this Court established the prevailing test for deciding whether a statutory procedure for the taking of property affords appropriate notice and a sufficient opportunity to be heard under the Due Process Clause:

> [I]dentification of the specific dictates of due process generally requires consideration of three factors: First, the property interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

of sufficient magnitude to require the very procedural safeguards absent in this case is further demonstrated by the action of the Texas Legislature in 1983, when the 68th Legislature unanimously voted to amend Article 3265 to require that a landowner or his attorney of record receive notice by certified or registered mail of the filing of a special commissioners' award. *See* Tex. Prop. Code Ann. § 21.049 (Vernon 1984).[4] This amendment made the Texas condemnation procedure consistent with the notice requirements that Texas law already imposed

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4. The legislative history behind the passage of the new statute reveals that the Texas Legislature was responding to court decisions criticizing the absence of a requirement that a landowner be notified of the filing of a condemnation award. In both *Dickey v. City of Houston, supra,* and *O'Bryan v. County of Harris,* 583 S.W.2d 896 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.), the Houston Court of Appeals itself had recognized the potentiality of the precise federal constitutional deprivations that Appellant suffered in this case:

> [T]his court has previously expressed a concern that the absence of a provision requiring notice to the condemnee of the award presents a serious due process question.
>
> [W]here one's rights to property may be substantially affected by his failure to object to an award filed with a court in a condemnation proceeding, and where the statutory period for making objections to the award runs from the time of the filing of the award, and further, where no notice of the filing of the award is required to be given and none is given the one whose property is in issue, the requisites of procedural due process would not appear to be satisfied.
>
> *Dickey v. City of Houston,* 494 S.W.2d 648, 649-50 (Tex. Civ. App.—Houston [14th Dist.] 1973), affirmed, 501 S.W.2d 293 (Tex. Sup. 1973). *This is particularly true in the absence of a mandatory time frame within which the commissioners must make their award.* Despite the language of the Texas Supreme Court; we remain convinced, in light of recent United States Supreme Court holdings in *Fuentes v. Shevin,* 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972), and the line of cases following, that the statutory scheme of condemnation in Texas provides a fair and realistic opportunity for the condemnee to learn of the award and preserve his right to appeal.

583 S.W.2d at 898.

on both judicial and administrative agencies. *See* Tex. R. Civ. P. 306a(3), 456, 457; Tex. Rev. Civ. Stat. Ann. art. 6252-13a, Sec. 16(b) (Vernon Supp. 1985).

In amending Article 3265, the Texas Legilature obviously intended to prevent precisely the type of loss that occurred in this case by placing the burden on the condemning authorities to see that landowners or their attorneys of record receive written notice of the filing of special commissioners' awards in order to preserve their rights to judicial review. The Texas appellate courts, however, have denied Appellant's rights to due process and just compensation by rigorously applying the old procedure. That the Texas Legislature has now corrected this problem provided the Houston Court of Appeals and the Supreme Court of Texas with no excuse for denying Appellant's bill of review and overturning her jury verdict. Nor should this fact justify this Court in refusing to grant relief to Appellant. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 425 n.1 (1982); *Griffin v. Griffin*, 327 U.S. 220, 225 n.1 (1946).

This Court should therefore note probable jurisdiction of this appeal to decide whether the Due Process and Just Compensation Clauses of the Fifth and Fourteenth Amendments required Appellee to notify Appellant by reasonable means of the filing of the special commissioners' award in order to secure her opportunity to present her objections to the award and thereby invoke her statutory right to judicial review.

CONCLUSION

Appellant submits that it is fundamentally unfair that she should be made the victim of a condemnation procedure that the Legislative Department of the State of Texas has recognized is unconstitutional. Appellant prays that this Court note probable jurisdiction of this appeal, and reverse the judgment of the Houston Court of Appeals.

Respectfully submitted,

REYNOLDS, ALLEN & COOK
Incorporated

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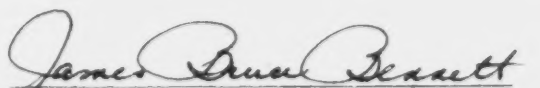
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Jurisdictional Statement has been mailed via certified mail, return receipt requested, to Mr. David H. Melasky, Assistant County Attorney, 1001 Preston, Suite 634, Houston, Texas 77002, this 20th day of January, 1986.


JAMES BRUCE BENNETT

APPENDIX "A"

Reversed and Rendered, and Opinion filed February 7, 1985

No. B14-84-508CV

HARRIS COUNTY, Appellant

v.

MARIAN FLEMING COMSTOCK, Appellee

Appeal from the County Court of Law #4
of Harris County
Trial Court No. 412,886 & 406,942

OPINION

Appellant, Harris County, brings this appeal to challenge an order of the trial court granting appellee's bill of review in a condemnation proceeding. Appellant additionally raises several points of error which concern the subsequent trial. We find the trial court erroneously granted appellee's bill of review; therefore we reverse and render.

On January 19, 1982, appellant initiated condemnation proceedings in the county court against certain property owned by appellee, Marian Fleming Comstock. The court appointed special commissioners who proceeded to conduct a hearing in April of 1982. An award of $186,971.00 was filed with the court. However, due to faulty service, appellee did not receive notice of the hearing and failed to appear. When the county attempted

to take possession of the property, she filed for injunctive relief in district court. A Temporary Restraining Order was issued, followed by an Agreed Injunction, which voided all prior proceedings and ordered the commissioners to conduct a second hearing on July 20 to assess appellee's damages. Ms. Fleming and her attorney were present at the second hearing.

The commissioners filed their second award, pursuant to the July 20 hearing, on July 22, 1982. This award was in the amount of $208,531.00. Appellee failed to file any objections to the award within the period mandated by statute. She instead waited until September 2, 1982, to file her objections. Harris County moved for entry of judgment on the award, which the court granted due to the absence of timely objections. Appellee then filed for a bill of review, which the trial court granted over objection from appellant. The cause was set for trial and at the trial, Harris County renewed its objection to the bill and resulting trial. The jury reached an award of $308,655.00. This appeal followed.

Appellant contends in its first point of error that the trial court improperly granted appellee's bill of review and that the judgment entered on the award should not have been set aside. Two grounds were offered by appellee to support the bill of review. First, she claimed she had not received prompt notification of the filing of the award, and second, appellee alleged that the entry of the judgment was induced by fraud. We must examine each ground to determine if the trial court acted prudently in granting appellee's bill.

The eminent domain statutes which were in effect at the time of the award did not require notice to be served

upon the landowner when the commissioners filed the award. TEX. REV. CIV. STAT. ANN. arts. 3264, 3265 (Vernon 1968) (repealed 1983).[1] Once the property owner received notification of the hearing to assess damages, he assumed the responsibility of keeping himself abreast of all subsequent actions occurring in the condemnation proceeding. *Dickey v. City of Houston,* 501 S.W.2d 293 (Tex. 1973). Accordingly, lack of notice of the filing of an award will not suffice as grounds for a bill of review.

The second ground appellee raised to support her bill of review was that the entry of the judgment was induced by fraud. The party who moves for a bill of review in a condemnation case must establish that fraud, accident or mistake was involved in the rendition of the judgment. *Dickey,* 501 S.W.2d at 294; *O'Bryan v. County of Harris,* 583 S.W.2d 896 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). The movant must demonstrate that the fraudulent behavior acted to deprive movant from knowing his rights or presenting them at trial. *Alexander v. Hagedorn,* 148 Tex. 565, 226 S.W.2d 996 (1950); *See Swaim v. Texas Electric Service Company,* 590 S.W. 2d 788 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.). In *Swaim,* the landowners moved for a bill of review complaining that their failure to file timely objections to the award was due to certain false statements made by an employee of Texas Electric Service Company. They alleged the employee had stated the condemned property would not be fenced, when in fact the award expressly permitted such enclosure of the property. The

1. Eminent Domain statutes are now located at Tex. Prop. Code Ann. ch. 21 (Vernon 1984). The cited provision remains unchanged in the new Code.

court found these representations to be insufficient to support a bill of review. We find that holding to be controlling of the facts presented in this appeal.

A thorough examination of the evidence offered by appellee at the bill of review hearing reveals appellee wholly failed to establish the existence of fraud to the degree necessary to warrant a bill of review. The only evidence appellee offered on the issue of fraud was testimony of her attorney that certain parties had indicated the matter could be expedited. No evidence was offered as to the identity of the speaker or his intent in making the statement. Further, appellee failed to explain how this statement would prevent her from filing a timely objection to the award. *See Swaim*, 590 S.W.2d at 789. To the contrary, such a statement would more reasonably indicate the need to file objections well in advance of the normal deadline, not later.

A review of the record reveals no evidence that would entitle appellee to relief by means of a Bill of Review. We sustain appellant's first point of error and reverse and render that the judgment entered on September 23, 1982, in the amount of $208,531.00 be reinstated. Our disposition of this point eliminates the need to consider appellant's remaining points.

/s/ Bill Cannon
Associate Justice

Judgment Rendered and Opinion filed February 7, 1985.

Panel consist of Associate Justices Pressler, Cannon and Draughn.

APPENDIX "B"

NO. 412,886

IN THE COUNTY CIVIL COURT AT LAW NO. 4
OF HARRIS COUNTY, TEXAS

HARRIS COUNTY, TEXAS

v.

MARIAN FLEMING COMSTOCK, ET AL

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now Marian W. Fleming, and files these Proposed Findings of Fact and Conclusions of Law and respectfully requests the Court to approve the following:

FINDINGS OF FACT

1. Prior to March 23, 1982, Harris County filed its Original Petition to initiate the condemnation of property owned by Marian W. Fleming which was the subject matter of this cause.

2. The Original Petition was served on Marian W. Fleming on or about March 23, 1982, together with notice of a hearing set to be held before the Special Commissioners on March 30, 1982 for the determination of damages to be awarded to Marian W. Fleming for the condemnation of her property by Harris County.

3. Marian W. Fleming did not receive notice of the March 30 hearing as required by law.

19. Thereafter, the Special Commissioners awarded Marian W. Fleming $208,531.00 as damages resulting from the condemnation of her property by Harris County.

20. The Special Commissioners' award was signed by the Honorable Charles Coussons, Judge of County Civil Court at Law No. 4, on July 24, 1982.

21. The Special Commissioners' award was filed with the County Civil Court at Law No. 4 on July 26, 1982.

22. No notice of the signing or filing of the Special Commissioners' award was given to Marian W. Fleming or her counsel.

23. Neither Marian W. Fleming nor her counsel received notice of the signing or filing of the award of the Special Commissioners until September 2, 1982.

24. Marian W. Fleming filed an objection to the award of the Special Commissioners on September 2, 1982.

25. On September 17, 1982, Marian W. Fleming filed her Bill of Review in the cause styled *Marian W. Fleming v. Harris County, Texas, Cause No. 412,886, County Civil Court at Law #4, Harris County, Texas.*

26. On September 23, 1982, the Honorable Charles Coussons, Judge of the County Civil Court at Law No. 4, signed the judgment on the award of the Special Commissioners.

27. On October 5, 1982, the Bill of Review proceedings were held before the Honorable Charles Coussons, Judge Presiding over County Civil Court at Law No. 4.

28. On October 18, 1983, the Honorable Charles Coussons, Judge of the County Civil Court at Law No. 4, signed the judgment granting the Bill of Review.

29. On May 21, 1984, this cause proceeded to trial.

30. On June 18, 1984, the Honorable Charles Coussons, Judge of the County Civil Court at Law No. 4, signed the judgment in this cause awarding Plaintiff $338,655.00 in damages as the result of the condemnation of her property by Harris County.

CONCLUSIONS OF LAW

1. All jurisdictional prerequisites were met with respect to the Bill of Review.

2. The County Civil Court at Law No. 4 had jurisdiction to consider the Bill of Review and enter a judgment granting the Bill of Review.

3. Marian W. Fleming did not receive notice of the filing of the award of the Special Commissioners prior to September 2, 1982.

4. Marian W. Fleming's failure to receive notice of the award of the Special Commissioners and file an objection thereto prior to September 2, 1982, was the result of fraud, accident or mistake.

5. Marian W. Fleming was not negligent or otherwise at fault in failing to receive notice of the award of the Special Commissioners or file an objection thereto prior to September 2, 1982.

6. The failure of Marian W. Fleming to receive notice of the award of the Special Commissioners and to file an objection thereto prior to September 2, 1982 was not in any way colored by any negligence or any fault.

7. Marian W. Fleming had a meritorious defense to the award of damages by the Special Commissioners and the judgment entered thereon.

Respectfully submitted,

REYNOLDS, ALLEN & COOK
Incorporated

/s/ KYLE R. SEARS
Kyle R. Sears
TBA# 17959800
3300 Allied Bank Plaza
Houston, Texas 77002
(713) 651-1300

Attorneys for Marian W. Fleming

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Proposed Findings of Fact and Conclusions of Law have been mailed to Mr. William Crawford, Assistant County Attorney, 1001 Preston, Suite 634, Houston, Texas 77002 via certified mail, return receipt requested, this 20th day of July, 1984.

/s/ KYLE R. SEARS
Kyle R. Sears

ORDER

Approved as filed. Clerk to notify.

Signed July 26, 1984.

/s/ CHARLES COUSSONS
Judge Presiding

APPENDIX "C"

No. B14-84-508CV

HARRIS COUNTY, Appellant

v.

MARIAN FLEMING COMSTOCK, Appellee

Appeal from the County Court of Law #4
of Harris County
Trial Court No. 412,886 & 406,942

JUDGMENT

"This cause, an appeal from the judgment in favor of Appellee, MARIAN FLEMING COMSTOCK signed October 18, 1983, came on to be heard on the transcript of the record. The same having been inspected, it is the opinion of this Court that the trial court committed reversible error in granting appellee's bill of review. It is ordered and adjudged that the judgment of the Court below be reversed. This court now renders judgment that the judgment entered on September 23, 1982, upon the commissioners award in the amount of $208,531.00 be reinstated.

In addition, it is ordered that Appellee, MARIAN FLEMING COMSTOCK, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

APPENDIX "D"

COURT OF APPEALS
14th Supreme Judicial District
1307 San Jacinto, 11th Floor
Houston, Texas 77002

March 14, 1985

Hon. William R. Crawford
Assistant County Attorney
1001 Preston
Suite 634
Houston, TX 77002

Hon. David H. Melasky
Assistant County Attorney
1001 Preston, Suite 634
Houston, TX 77002

Hon. Michael K. Swan
Reynolds, Allen & Cook
3300 Allied Bank Plaza
Houston, TX 77002

RE: CASE NO. 14-84-00508-CV
TRIAL COURT CASE NO. 406,942

STYLE: Harris County, Texas
V: Comstock, Marian Fleming, Et Al

Gentlemen:

Please be advised that, on this date, the Court OVERRULED appellee's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, April 15, 1985.

Respectfully yours,
MARY JANE SMART, Clerk

By: /s/ CHARLENE MITCHELL,
Deputy

RECEIVED: March 18, 1985

APPENDIX "E"

IN THE SUPREME COURT OF TEXAS

No. C-4072 September 18, 1985

MARIAN FLEMING COMSTOCK

v.

HARRIS COUNTY, TEXAS

From Harris County,
Fourteenth District.

Application of petitioner for writ of error to the Court of Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Marian Fleming Comstock, pay all costs incurred on this application.

No. C-4072 October 23, 1985

MARIAN FLEMING COMSTOCK

v.

HARRIS COUNTY, TEXAS

From Harris County,
Fourteenth District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 23rd day of October, 1985.

MARY M. WAKEFIELD, Clerk

By: /s/ COURTLAND CROCKER
Courtland Crocker, Deputy

APPENDIX "F"

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS AT HOUSTON

NO. 14-84-00508-CV

HARRIS COUNTY, TEXAS,
Appellant,

v.

MARIAN FLEMING COMSTOCK,
Appellee.

(Filed December 23, 1985)

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Marian Fleming Comstock, the Appellee in the above referenced cause, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston reversing the trial court judgment in Cause No. 406,942 and rendering judgment for Appellant, Harris County, Texas, which was entered in this cause on February 7, 1985. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ J. BRUCE BENNETT
J. Bruce Bennett
State Bar No. 02145500
Michael K. Swan
State Bar No. 19549000
Reynolds, Allen & Cook
Incorporated
3300 Allied Bank Plaza
Houston, Texas 77002

Counsel for Appellant
Marian Fleming Comstock

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States, has been served on Mr. William R. Crawford, Assistant County attorney, 1001 Preston, Suite 634, Houston, Texas 77002, by post-paid certified mail, return receipt requested, on the 23rd day of December, 1985.

/s/ J. BRUCE BENNETT
J. Bruce Bennett

Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1256

In The
Supreme Court of the United States
October Term, 1985

MARIAN FLEMING COMSTOCK,
Appellant,

v.

HARRIS COUNTY, TEXAS,
Appellee.

On Appeal From The Court Of Appeals For The Fourteenth Supreme Judicial District of Texas At Houston

MOTION TO DISMISS OR AFFIRM

MICHAEL DRISCOLL
County Attorney

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QUESTIONS INVOLVED

1. WHEN THE QUESTION PRESENTED BY APPELLANT IN THIS COURT WAS RAISED FOR THE FIRST TIME ON APPEAL IN THE MOTION FOR REHEARING AND WAS NEVER ADDRESSED BY THE STATE COURTS, HAS THE ISSUE BEEN PROPERLY PRESERVED FOR REVIEW BY THIS COURT?

2. WILL THIS COURT REVIEW A DECISION BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND?

3. WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN AN EMINENT DOMAIN CASE BY A LANDOWNER WHO CONTENDS THAT HER FAILURE TO RECEIVE NOTICE OF THE FILING OF A SPECIAL COMMISSIONERS' AWARD IS A DENIAL OF DUE PROCESS, WHEN THE LANDOWNER AND HER ATTORNEY APPEARED AT THE SPECIAL COMMISSIONERS' HEARING AND WERE THEREBY PLACED UNDER A DUTY TO TAKE NOTICE OF SUBSEQUENT ACTS OF THE SPECIAL COMMISSIONERS AND THE FAILURE OF APPELLANT TO EXERCISE DUE DILIGENCE IN MONITORING THE CASE RESULTED IN HER FAILURE TO COMPLY WITH THE STATUTORY FILING PERIOD IN WHICH TO REQUEST JUDICIAL REVIEW?

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No. 85-1256

In The

Supreme Court of the United States

October Term, 1985

MARIAN FLEMING COMSTOCK,

Appellant,

v.

HARRIS COUNTY, TEXAS,

Appellee.

On Appeal From The Court Of Appeals For The Fourteenth Supreme Judicial District of Texas At Houston

MOTION TO DISMISS OR AFFIRM

Appellee County of Harris moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Appeals, on appeal pursuant to 28 U.S.C. § 1257(2).

STATEMENT OF THE CASE

The case at bar is an appeal from a bill of review proceeding which was tried in the County Civil Court at Law

of Harris County, Texas. The underlying controversy involves the condemnation by Appellee, Harris County, Texas, of certain lands owned by Appellant, Marian Fleming Comstock, for use as a public road. Pursuant to the Texas statutes governing eminent domain, a suit in condemnation was filed by Appellee in the County Civil Court at Law of Harris County, Texas. (Cause No. 406,942)

In accordance with Tex. Rev. Civ. Stat. Ann. arts. 3264, 3265 and 3266 (Vernon 1968) (Repealed 1983), three special commissioners were appointed by the court to hold a hearing and assess the amount of compensation due the landowner. The special commissioners held a hearing on July 20, 1982 which hearing was attended by Appellant and her Attorney. On July 22, 1982 the special commissioners filed an Award with the Court assessing the sum of $208,531.00 as compensation for the taking. Upon the filing of this Award, any party to the suit could obtain a civil trial by filing an objection to the award with the County court on or before the Monday following the 20th day after the award was filed with the court. This requirement is jurisdictional. In the absence of the timely filing of an objection, the award of the special commissioners will become the basis for a Judgment of the County Court.

It is undisputed that no objection to the award was filed in Cause No. 406,942 by either Appellant or by any other party to the suit within the time allowed by Art. 3266, Tex. Rev. Civ. Stat. Ann. Accordingly, after the expiration of the statutory period for filing objections, Harris County moved the trial court to enter a Judgment on the Award. During the pendency of this motion for Judgment on the Award, Appellant filed a new action in the County Civil Court at Law (Cause No. 412,886) seeking a

bill of review which would set aside any judgment entered in Cause No. 406,942. On September 23, 1982 the trial court entered a Judgment on the Award in Cause No. 406,942.

Although Appellant now contends that entry of the September 23, 1982 Judgment deprived her of her right to due process and just compensation, these allegations were never raised in the trial court either in opposition to the motion for entry of Judgment on the Award or in support of her petition for a bill of review. Assuming *arguendo* that these allegations had any merit, the trial court should have been alerted to the purported constitutional defects in the proceedings and thereby allowed the opportunity to enter any orders necessary to correct the asserted error. Appellant, however, failed to afford the trial court with any opportunity to rule on these issues. No appeal was taken from the September 23, 1982 judgment.

In the bill of review proceeding, Appellant was required to prove the existence of circumstances which the Texas courts have determined to be sufficient to invoke the equitable jurisdiction of the county court when a party fails to timely file objections to an award of the special commissioners. The criteria for determining such circumstances are inherently a creature of Texas law. In her bill of review, Appellant, through both pleadings and evidence, sought solely to show the county court that her situation justified the granting of a bill of review according to the Texas case law governing same. Appellant contended that, although it was undisputed that both she and her attorney attended the special commissioners hearing and that on or before July 26, 1982 the Award of the special commissioners was filed with the clerk of the court as part of the public records of the court, her failure to receive notice of the filing of the award, irrespective of the lack of

evidence of any effort on her part to contact the clerk and determine the status of the case, justified her request for a bill of review. The trial court granted the bill of review on October 18, 1983 and a jury trial on the issue of compensation resulted in a verdict of $308,655.00.

Upon appeal by Harris County from the Judgment based on this jury verdict, the Texas Court of Appeals for the Fourteenth Supreme Judicial District held that the evidence submitted to the County court was, as a matter of law, not sufficient to invoke the equitable jurisdiction of the trial court and that the granting of the bill of review was reversible error.[1] The Court of Appeals, therefore, reversed the judgment in Cause No. 412,886 and rendered the judgment entered on September 23, 1982. Appellant did not raise any constitutional question in the court of appeals at any time prior to the decision of the court.

Appellant Comstock filed a motion for rehearing in the Court of Appeals in which for the first time there was

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1 Specifically, the Court of Appeals noted the following:

> "A thorough examination of evidence offered by appellee at the bill of review hearing reveals appellee wholly failed to establish the existence of fraud to the degree necessary to warrant a bill of review. The only evidence appellee offered on the issue of fraud was testimony of her attorney that certain parties had indicated the matter could be expedited. No evidence was offered as to the identity of the speaker or his intent in making the statement. Further, appellee failed to explain how this statement would prevent her from filing a timely objection to the award. *See Swaim*, 590 S.W.2d at 789. To the contrary, such a statement would more reasonably indicate the need to file objections well in advance of the normal deadline, not later.
>
> A review of the record revealed no evidence that would entitle appellee to relief by means of a Bill of Review."

See App. A, page 4a of Appellant's Jurisdictional Statement.

asserted to be constitutional defects in the proceedings. The motion for rehearing was denied without comment as was the application for writ of error filed with the Texas Supreme Court.

———o———

ARGUMENT

I.

THE FEDERAL QUESTION WAS NOT PROPERLY PRESENTED IN TEXAS COURTS

This Court has held that no appellate jurisdiction will lie over a federal claim not properly drawn into question in state court or deemed by that state's highest court to be in issue. *Memphis Natural Gas Co. v. Beeler,* 315 U.S. 649, 62 S.Ct. 857, 86 L.Ed. 1090 (1942); *Fuller v. Oregon,* 417 U.S. 40, 50 n. 11, 94 S.Ct. 2116, 2123 n. 11, 40 L.Ed.2d 642 (1974).

The federal question in the case at bar was not properly presented in the Texas state courts. Appellant decisively waived her right to complain of alleged due process violations when she failed to raise the issue prior to the entry of the judgment on the award or in her petition for bill of review. During no stage of the lower court proceedings was the unconstitutionality of the eminent domain statutes asserted. It was not until after a full briefing on the merits, oral arguments and an adverse appellate decision, that Appellant asserted for the first time, in a motion for rehearing, her contentions of constitutional infirmities. The Court of Appeals overruled her motion without comment, and the Texas Supreme Court, also without comment, refused her application for writ of error.

The general rule in Texas is that the constitutionality of a statute will not be considered by appellate courts when the question is presented for the first time on appeal.[2] *Wood v. Wood,* 320 S.W.2d 807 (Tex., 1959); *United Postage Corp. v. Kammeyer,* 581 S.W.2d 716 (Tex.Civ.App.—Dallas 1979 no writ); *Trice Production Co. v. Dutton Drilling Co.,* 333 S.W.2d 607 (Tex.Civ.App.—Houston 1960 writ ref. n.r.e.).

The Texas Supreme Court has directly addressed challenges to condemnation proceedings, and has held repeatedly that such challenges must be preserved at the trial level in order to form the predicate for complaint on appeal. *P G P Gas Products, Inc. v. Fariss,* 620 S.W.2d 559 (Texas, 1981); *Holloway v. County of Matagorda,* 686 S.W.2d 100 (Texas, 1985).

Both the Texas Court of Appeals and the Texas Supreme Court were silent on Appellant's due process contentions. Nevertheless, through their silence, the Texas courts have said that a substantial issue was not presented which would have justified their review. Where a state court has been silent on a federal question, this Court will assume that such silence was due to want of proper presen-

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2 The fundamental error rule is the exception to the general rule that Texas appellate courts will not consider constitutional issues presented for the first time on appeal. Under the fundamental error rule, appellate courts *may* consider constitutional challenges to a statute which were not raised at the lower level, if (1) the statute's unconstitutionality is obvious and apparent; or (2) the statute is of sufficient public interest to justify consideration. *Determan v. City of Irving, Texas,* 609 S.W.2d 565 (Tex.Civ.App.—Dallas 1980, no writ). Since neither the Court of Appeals nor the Texas Supreme Court addressed Appellant's due process claim, it goes without saying, that no fundamental error was found.

tation unless the appellant can show to the contrary. Appellant has not done so. *Street v. New York,* 394 U.S. 576 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *Fuller v. Oregon, supra.* Accordingly, the jurisdictional predicate for appellate review by this court is lacking.

II.

AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND EXISTS TO UPHOLD THE DECISION OF THE TEXAS COURT OF APPEALS

The Supreme Court has consistently adhered to the principle that it will not review a state court judgment based on an adequate and independent non-federal ground. Supreme Court Rule 16.1(b); *Murdock v. City of Memphis,* 20 Wall (87 US) 590, 22 L.Ed. 429 (1875).

The Court of Appeals decision to reinstate the award of the special commissioners rests on substantive state grounds. The applicable law governing appeals in eminent domain proceedings is explicit: when no timely objections have been filed, the court has the ministerial duty of entering judgment on the award and no appeal may be taken therefrom. Tex. Rev. Stat. Ann., art. 3266 (Repealed); *Pearson v. State,* 325 S.W.2d 935 (Texas, 1958); *Dickey v. City of Houston,* 501 S.W.2d 293 (Texas, 1973).

Appellant sought relief from the judgment by the equitable remedy of bill of review. However, her argument that failure to receive notice of the filing of the award excused noncompliance with the statutory deadline, is not one recognized under Texas Law. The courts have held without exception that lack of notice of the entry of the award by itself does not support a bill of review.

Dickey v. City of Houston, supra; Harrell v. City of Denton, 116 S.W.2d 423 (Tex.Civ.App.—Fort Worth 1939, no writ); *Svoboda v. State,* 612 S.W.2d 229 (Tex.Civ.App.—Tyler 1981, no writ). Having appeared and participated in the special commissioners hearing, Appellant was under a continuing obligation to keep herself informed of the subsequent acts of the commissioners. *Dickey v. City of Houston, supra.*

While allegations of fraud, mistake or accident will invoke equitable review powers, the Texas Court of Civil Appeals found no evidence to support Appellant's contention that the judgment was entered through fraud, mistake or accident. Therefore, the Texas Court of Civil Appeals appropriately reversed the trial court judgment and reinstated the award of the special commissioners based on the principles governing bills of review in Texas—a reason independent of federal law and completely adequate and sufficient under Texas law.

III.

APPELLANT WAS NOT DENIED DUE PROCESS OR JUST COMPENSATION IN THE EMINENT DOMAIN PROCEDURES FOLLOWED IN THIS CASE

The Texas eminent domain statutes afford a landowner due process by requiring a hearing of three special commissioners to determine compensation prior to the taking of property and by requiring that notice of the special commissioners hearing be personally served on the landowner. In the case at bar it is undisputed that both the landowner and her attorney made an appearance in this cause by attending the special commissioner's hearing and thereby any complaint based on failure to receive notice

was waived. Having appeared, it became the duty of Appellant, as in any civil action, to exercise due diligence in monitoring the progress of the litigation and the failure of Appellant to meet a filing deadline due to the lack of such diligence does not constitute a denial of due process.

ARGUMENT

The requisite dictates of due process in an eminent domain proceeding were discussed by this Court in *Bailey v. Anderson,* 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945). The case involved a review of the Virginia eminent domain procedures which allowed for the taking of land for public use prior to a hearing on compensation and prior to the payment of compensation to the property owner. In holding that this procedure was not constitutionally infirm, this Court stated the following:

> "But it has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken. *Bragg v. Weaver,* 251 U.S. 57, 62, 40 S.Ct. 62, 64, 64 L.Ed. 135, and cases cited; *Joslin Mfg. Co. v. City of Providence,* 262 U.S. 668, 677, 43 S.Ct. 684, 688, 67 L.Ed. 1167; *State of Georgia v. City of Chattanooga,* 264 U.S. 472, 483, 44 S.Ct. 369, 371, 68 L.Ed. 796. Its value may be fixed by viewers without a hearing, after entry upon the land, if their award is subject to a review in which a trial upon evidence may be had. *Pearson v. Yewdall,* 95 U.S. 294, 296, 24 L.Ed. 436; *Backus v. Fort Street Union Depot Co.,* 169 U.S. 557, 569, 18 S.Ct. 445, 450, 42 L.Ed. 853; *Bragg v. Weaver, supra,* 251 U.S. 59, 40 S.Ct. 63, 64 L.Ed. 135,

and cases cited; *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 284, 285, 45 S.Ct. 491, 495, 69 L.Ed. 963."

326 U.S. at 205, 66 S.Ct. at 67.

See also *U.S. v. 131.68 Acres of Land, More or Less, Etc.*, 695 F.2d 872, 875 (5th Cir. 1983) cert. denied, 464 U.S. 817, 104 S.Ct. 77 (1983).

In contrast to the procedures described in *Bailey*, the Texas statutes on eminent domain which were applicable to the instant cause provided the landowner with both a hearing prior to the taking and required the tender of compensation as a condition precedent to the actual possession of the property by Harris County. *See* Tex. Rev. Civ. Stat. Ann. art. 3264 §§ 2, 3, 4, 5 and 6 and 3268 (Vernon 1968) (Repealed 1983). Federal courts have twice in recent years scrutinized the Texas eminent domain statutes for constitutionality and found them to pass muster. A broadside attack against the entire statutory scheme was entertained by a three judge panel in *Joiner v. City of Dallas*, 380 F.Supp. 754 (N.D. Texas, 1974), *affirmed* 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974) and no constitutional infirmity was found. In *Smart v. Texas Power & Light Co.*, 525 F.2d 1209 (5th Cir. 1976) reh. den. 528 F.2d 928 cert. denied, 429 U.S. 826 (1976), the Fifth Circuit upheld the constitutionality of allowing possession by the condemnor upon deposit of the special commissioner's award.

In the case *sub judice*, Appellant does not dispute the fact that she and her attorney both attended the hearing at which the Special Commissioners determined the amount of compensation which would be necessitated by the taking of the subject property. It is therefore clear that the

cases relied on by Appellant, *Bragg v. Weaver,* 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135 (1919) and *North Laramie Land Company v. Hoffman,* 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925), are distinguishable from the instant cause. In both *Bragg* and *North Laramie* the question before the court was whether the landowner had received adequate notice of the commencement of eminent domain proceedings at which just compensation would be determined. In both cases this court held that a landowner must be afforded notice of a commencement of the hearing at which compensation will be determined. See also *Walker v. Hutchinson,* 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed. 2d 178 (1956).

Furthermore, it is settled law that appearance in a proceeding waives any right to complain about notice. Texas courts have specifically held that appearance at a special commissioners hearing will waive any complaint as to lack of service. *State v. Lee,* 346 S.W.2d 498 (Tex.Civ. App.—Waco, 1961) reversed on other grounds 352 S.W.2d 724 (Tex. 1962). Similarly the Federal Rules provide that an appearance will waive service. *Pila v. G. R. Leasing and Rent Corp.,* 551 F.2d 941 (1st Cir. 1977), *Giannakos v. M/V Bravo Trader,* 762 F.2d 1295 (5th Cir. 1985). Thus by appearing at the Special Commissioners hearing, Appellant waived any right to complain about lack of notice of the eminent domain proceedings.

Having appeared in the condemnation proceeding, Appellant was under a continuing duty to apprise herself of the status of the proceedings. The award of the special commissioners was filed with the clerk of the court and became part of the record of the county court and thus available for public inspection. The duty that is imposed on par-

ties to a condemnation proceeding was specifically set forth by the Texas Supreme Court in *Dickey v. City of Houston*, 501 S.W.2d 293 (Tex., 1973) wherein the court stated the following:

> "In this instance petitioners' motion in the trial court appears to be merely an attempt to have the judgment set aside on the ground that it is void because petitioners were not notified of the filing of the commissioners' decision. There is no merit in this contention. The record shows that petitioners were duly notified of and appeared at the commissioners' hearing. It was then their duty to take cognizance of the subsequent acts of the commissioners. They were chargeable with notice that it was the duty of the commissioners to make an award and return it as provided by law, and that the judge would cause it to be entered in the minutes as the judgment of the court unless timely objections were filed. See *Harrell v. City of Denton*, Tex.Civ.App., 116 S.W.2d 423 (no writ)."

Id. at 294.

A similar duty is placed on federal litigants by Rule 77(d) of the Federal Rules of Civil Procedure which specifically notes that the time for appeal is not affected by lack of notice of the entry of the judgment by the clerk. In *Jones v. Estelle*, 693 F.2d 547 (5th Cir. 1982) cert. denied 460 U.S. 107, 103 S.Ct. 1528, 75 L.Ed.2d 950 (1983), the Fifth Circuit specifically noted in regard to Fed. R. Civ. P. Rule 77(d) that "underlying the rule is the implicit burden on the party and the counsel to make 'periodic inquiries' into the course of the proceedings." 693 F.2d at 549. See also *Kramer v. American Postal Workers Union, AFL-CIO*, 556 F.2d 929 (9th Cir. 1977).

In the case at bar, Appellant and her attorney attended the special commissioners hearing and this appear-

ance constituted a waiver of any failure to receive notice.[3] The assertions of due process raised by Appellant are not akin to the landowners who were arguably unaware of the commencement of proceedings as in *Bragg* and *North Laramie, supra,* but are an attempt to clothe in the garments of due process the naked failure of Appellant to diligently monitor the case, a duty imposed on litigants by the Texas courts and by this court through the adoption of Fed. R. Civ. P. Rule 77(d).[4] Under the Texas statutes,

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3 It should be noted that Appellant is not an unsophisticated individual, naive to the procedures of eminent domain. The July 20, 1985 Special Commissioners hearing was the second Special Commissioners hearing held in this cause. Appellant did not appear at the first hearing. Upon the taking of possession of the subject property by Harris County, Appellant filed a suit in a Texas District Court for injunctive relief alleging lack of notice of the hearing. The second Special Commissioners hearing was held after an agreed injunction had been entered which prohibited the County from taking possession based on the earlier Special Commissioners hearing.

4 Appellant argues strenuously that the enactment by the legislature of Art. 21.019 of the Texas Property Code, which requires the clerk of the court to send notice of the filing of the special commissioners award, somehow indicates that the earlier statutory proceeding was unconstitutional. By this argument, appellant has ignored the admonitions of the three Judge panel in *Joiner v. City of Dallas, supra,* wherein the limits of constitutional scrutiny were described as follows:

> We recognize, of course, that the constitutional requirements of due process and equal protection are not necessarily static concepts. Neither, on the other hand, are they protean labels capable of encompassing every desirable innovation and improvement. Even viewed through a 1974 prism, the Constitution does not purport to correct every wrong; and though it is the Supreme Law of the Land, the

(Continued on following page)

Appellant received both a hearing on fair market value and compensation in advance of the taking of her land. These procedures went far beyond the constitutional minimums. The due process dictates having been satisfied by the special commissioners hearing, there does not exist a substantial federal question.

———o———

CONCLUSION

For the foregoing reasons Harris County respectfully submits that the state statutes challenged by Appellant were not specifically reviewed by the State Courts and that the Texas Court of Appeals had an adequate independent state ground for its decision. Furthermore, Appellant has failed to present a substantial federal qeustion which this Court should entertain. The appeal herein should, there-

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> rights its secures to citizens constitute the bedrock of our legal system, not the summit.

380 F. Supp. at 779. The court further noted that to pass constitutional muster, a condemnation statute need only "insure to property owners their minimum rights under well-established interpretations of the Fourteenth Amendment. We cannot compel more than this, for the Constitution, is not a blueprint for the heavenly city." *Id.* at 779. The fact that the legislature in 1983 added certain provisions to protect parties from their own negligence does not *ipso facto* render the earlier statute constitutionally defective.

fore, be dismissed or in the alternative, the judgment of the Texas Court of Appeals affirmed.

Respectfully submitted,

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NO. 85-1256 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARIAN FLEMING COMSTOCK,
Appellant,

v.

HARRIS COUNTY, TEXAS,
Appellee.

On Appeal From The Court of Appeals For The Fourteenth Supreme Judicial District of Texas

APPELLANT'S REPLY MEMORANDUM

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APPELLANT'S REPLY MEMORANDUM

I. APPELLANT TIMELY PRESENTED THE FEDERAL QUESTION IN THE TEXAS COURTS.

Appellee (the "County") contends that this Court has no jurisdiction over Appellant's ("Comstock") appeal because Comstock did not assert in the trial court the constitutional insufficiency of the condemnation procedure used to take her property. The County argues that, under Texas case law, the unconstitutionality of a statute must always be asserted in the trial court. Under well-settled

Texas law, however, whenever the constitutionality of a statute becomes *necessary* to a decision of a case, the Texas appellate courts "always adjudicate whether a statute is constitutional . . . regardless of when or how the question is raised." *Gohlman, Lester & Company v. Whittle,* 114 Tex. 548, 559-560, 273 S.W. 808 (1925); *Lovejoy v. Lillie,* 569 S.W.2d 501, 503 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). The unconstitutionality of the statute need not even have been pleaded in the trial court. *Terrell v. Middleton,* 108 Tex. 14, 19, 191 S.W. 1140 (1916).

Here, the constitionality of the condemnation procedure did not become necessary to the disposition of this case until the Houston Court of Appeals reversed the trial court's judgment solely on the County's Point of Error No. 1. Point of Error No. 1 asserted that "The trial court erred in granting the bill of review and setting aside the judgment on the award *because* [*Comstock's*] *grounds of failure to receive notice of the filing of the special commissioners' award is not as a matter of law grounds for a bill of review where both* [*Comstock*] *and her attorney attended the special commissioners' hearing*". (Emphasis added). The trial court had ruled that Comstock was entitled to a bill of review setting aside the special commissioners' award because of the wrongful conduct of the County's attorney in failing to notify Comstock and her attorney of the filing of the award. Thus, the issue of whether the condemnation procedure was constitutional was *not* necessary to the trial court's judgment.

However, once the Houston Court of Appeals reversed Comstock's bill of review, the issue of whether the Due Process Clause of the Fourteenth Amendment and the

Just Compensation Clause of the Fifth Amendment required that Comstock be notified by reasonable means of the filing of the special commissioners' award became unavoidable and necessary to the decision of this case. At the first opportunity, Comstock, on Motion for Rehearing, expressly raised this constitutional issue, and under the decisions of *Gohlman* and *Terrell,* the Houston Court of Appeals, by overruling the Motion for Rehearing, is presumed to have adjudicated that issue against her. *See also Bragg v. Weaver,* 251 U.S. 57, 58 (1919).

II. THERE IS NO ADEQUATE INDEPENDENT STATE LAW GROUND TO UPHOLD THE JUDGMENT OF THE HOUSTON COURT OF APPEALS.

In contending that there exists an adequate, independent state law ground upholding the judgment of the Houston Court of Appeals, the County argues that its failure to notify Comstock of the filing of the special commissioners' award is not recognized as a ground for equitable relief under Texas law, because the condemnation procedure did not require that such notice be given. Of course, the County's argument is totally beside the point. Comstock's position is that the condemnation procedure was unconstitutional precisely because it failed to contain a statutory mechanism requiring the County to notify Comstock of the filing of the special commissioners' award.

The County also seems to contend that, while allegations of fraud, mistake, or accident may invoke equitable review powers, the Houston Court of Appeals found no evidence to support Comstock's contention that the special commissioners' award was filed without notice to her as a result of the County's wrongful conduct.

Contrary to the County's assertions, however, the actual basis for the Houston Court of Appeals' judgment was the absence of a notice requirement in the condemnation procedure. As shown above, the sole Point of Error sustained by the Houston Court of Appeals was the County's Point of Error No. 1. It did not sustain any of the County's other Points of Error, which asked the Court to set aside the trial court's findings of fact and conclusions of law that the County's attorney made representations that he would notify Comstock and her attorney of the filing of the special commissioners' award; that Comstock's failure to receive notice was the result of fraud, accident, or mistake; that Comstock was not negligent or otherwise at fault in failing to receive notice; and that Comstock's failure to receive notice was not in any way colored by her negligence or fault.

Moreover, even if the judgment of the Houston Court of Appeals was based upon the absence of wrongful conduct on the County's part, that basis would not constitute an adequate, independent state law ground precluding this Court's review, since Comstock and her attorney's misplaced reliance upon the County attorney's representations would not have occurred if a statutory provision had existed requiring the County to notify Comstock of the filing of the award.

III. APPELLANT WAS DENIED DUE PROCESS OF LAW AND JUST COMPENSATION BECAUSE OF THE ABSENCE OF NOTICE.

The County claims that this Court's decisions in *Bragg v. Weaver,* 251 U.S. 57 (1919), and *North Laramie Land Company v. Hoffman,* 268 U.S. 276 (1925) are distinguishable from this case, because

Comstock and her attorney were present at the special commissioners' hearing and were therefore chargeable with notice of the subsequent filing of the award. In both cases, however, this Court recognized that a notice problem of substantial constitutional dimensions is presented when, as here, the condemning authority makes its appealable ruling in the landowner's absence.

The County also cites cases to this Court that are completely immaterial to the constitutional question at issue. Whether or not the Texas courts have held that an appearance at a special commissioners' hearing waives any complaint as to lack of notice has no bearing on the question at issue of whether the federal Constitution required notice of subsequent events, knowledge of which by the landowner was necessary for her to continue the proceedings for determining just compensation by invoking judicial review of the special commissioners' award.

IV. CONCLUSION.

The constitutional question of whether the Due Process Clause and Just Compensation Clauses of the federal Constitution required the County to notify Comstock and her attorney of the filing of the special commissioners' award is properly before this Court, and it is a substantial

federal question that this Court should resolve in favor of Comstock.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Reply Memorandum have been served on Mr. Michael Driscoll, County Attorney, 1001 Preston, Suite 634, Houston, Texas 77002, by certified mail, return receipt requested, on the 18 day of March, 1986.

James Bruce Bennett

JAMES BRUCE BENNETT